APPENDIX

Opinion, Judgment and Dissenting Opinion of Court of Appeals

Board of Education of Central School District No. 1, Towns of East Greenbush, Nassau, Schodack, Sand Lake & North Greenbush, Rensselaer County and Chatham, Columbia County, et al., Appellants v. James E. Allen, Jr., as Commissioner of Education of the State of New York, Respondent, and Michael Rock, et al., Intervenors-Respondents.

Decided June 1, 1967

Scileppi, J. Section 1 of chapter 320 of the Laws of 1965 provides in part: "It is hereby declared to be the public policy of the state that the public welfare and safety require that the state and local communities give assistance to educational programs which are important to our national defense and the general welfare of the state." (L. 1965, ch. 320, § 1.)

In keeping with this declaration of policy, the Legislature enacted subdivision 2 (renum. subd. 3 by L. 1966, ch. 795) of section 701 of the Education Law permitting the appropriate school authorities "to purchase and to loan upon individual request, to all children * * * who are enrolled in grades seven to twelve of a public or private school which complies with the compulsory education law, textbooks. Textbooks loaned to children enrolled in grades seven to twelve of said private schools shall be textbooks which are designated for use in any public, elementary or secondary schools of the state or are approved by any boards of education, trustees or other school authorities. Such

textbooks are to be loaned free to such children subject to such rules and regulations as are or may be prescribed by the board of regents and such boards of education, trustees or other school authorities."

Plaintiffs seek judgment that this statute violates both the State and Federal Constitutions (N. Y. Const., art. XI, § 3; U. S. Const., 1st and 14th Amdts.). The defendant Commissioner of Education and the intervenors-defendants, parents of children residing in plaintiffs' school district who attend parochial schools, moved for dismissal of the complaint for failure to state a cause of action or for summary judgment declaring the statute constitutional. The plaintiff Boards of Education cross-moved for summary judgment declaring the statute unconstitutional.

Special Term denied all defendants' motions and granted plaintiffs' cross motion, holding that the plaintiffs had standing to sue; that the statute contravenes section 3 of article XI of the State Constitution (the "Blaine Amendment"); and that the statute violates the establishment and free exercise clauses of the First Amendment.

The Appellate Division reversed upon the ground that the plaintiffs had no standing.

Since we must reach the merits in this case,[1] we come to the question whether this statute violates section 3 of article XI of the New York State Constitution: "Neither the state nor any subdivision thereof shall use its property or credit or any public money, or authorize or permit either to be used, directly or indirectly, in aid or maintenance, other than for examination or inspection, of any school or

[1] The writer and Judges BURKE and BERGAN agree with the Appellate Division majority that plaintiffs have no standing. Judge KEATING, who is for affirmance on the merits, agrees with the dissenters that plaintiffs do have standing.

institution of learning wholly or in part under the control or direction of any religious denomination, or in which any denominational tenet or doctrine is taught, but the legislature may provide for the transportation of children to and from any school or institution of learning."

The last portion of this section, relating to the transportation of children, was added by special amendment to obviate the decision in *Judd* v. *Board of Educ.* (278 N. Y. 200 [1938]).

In *Judd,* this court by a vote of four to three declared that a law which provided for school busing of parochial school children could not be sustained because it constituted indirect aid to schools which was in violation of the Blaine Amendment. *Judd* determined that, although school busing was primarily for the benefit of the child, it still had the effect of giving an incidental benefit to sectarian schools and thus ran afoul of section 3 of article XI prohibiting indirect aid. It is now argued that the statute before the court providing for textbooks loans to all children, including those attending parochial schools, must be unconstitutional for the same reason. We cannot agree with the reasoning of the majority in the *Judd* case and accordingly hold that it should not be followed. The New York State Constitution prohibits the use of public funds for a particular purpose; that is, aiding religiously affiliated schools. Certainly, not every State action which might entail some ultimate benefit to parochial schools is proscribed. Examples of co-operation between State and church are too familiar to require cataloguing here. As we said, although in a different context: "It is thus clear beyond cavil that the Constitution does not demand that every friendly gesture between church and State shall be discountenanced. The so-called 'wall of separation' may be built so high and

so broad as to impair both State and church, as we have come to know them". (*Matter of Zorach* v. *Clausen,* 303 N.Y. 161, 172, affd. 343 U.S. 306.) The architecture reflected in *Judd* would impede every form of legislation, the benefits of which, in some remote way, might inure to parochial schools. It is our view that the words "direct" and "indirect" relate solely to the means of attaining the prohibited end of aiding religion as such.

The purpose underlying section 701, found in the Legislature's own words (L. 1965, ch. 320, §1, *supra*), belies any interpretation other than that the statute is meant to bestow a public benefit upon all school children, regardless of their school affiliations. There can be no serious suggestion that the declaration of purpose by the Legislature was a verbal smoke screen designed to obscure a nefarious scheme to circumvent the New York State Constitution. No one in the last third of the 20th Century can doubt that a program aimed at improving the quality of education in all schools is a matter of legitimate State concern.

Since there is no intention to assist parochial schools as such, any benefit accruing to those schools is a collateral effect of the statute, and, therefore, cannot be properly classified as the giving of aid directly or indirectly.

Only textbooks designated for use by the public schools or approved by Boards of Education, trustees or school authorities may be lent (Education Law, §701, subd. 3). The State and local governments have long provided public libraries with books for use by all persons. It is not uncommon for schools, public and private alike, to assign various "outside readings" to pupils. Children often, then, fulfill assignments for courses in both public and private schools by means of using and borrow-from public libraries. We do not consider this indirect aid to private or parochial schools.

At a time when we have large-scale Federal and State aid to education, it is justly feared that children who are denied these benefits may receive education inferior to children in public schools. Unless certain types of aid can be made available to *all* children, we run the risk of creating an educational lag between children in public and private schools. We cannot perpetuate an erroneous interpretation of the State Constitution merely because it is contained in the reports of this court.

Having decided that section 701 entails no aid to the parochial schools, we thus hold that there is no Federal constitutional question under the establishment clause of the First Amendment. The State makes no affirmation of religious beliefs or activities within the public schools. Section 701 remains completely neutral with respect to religion, merely making available secular textbooks at the request of the individual student and asking no question about what school he attends. Despite the flexibility of the English language, it is impossible to conclude that loaning nonreligious textbooks to all students, including those who attend a parochial school, establishes a religion or constitutes the use of public funds to aid religious schools (cf. *Everson* v. *Board of Educ.*, 330 U. S. 1, 16, 18).[2]

---

[2] Mr. Justice JACKSON, who dissented in *Everson*, objected to the statute there under consideration because it limited payments to the parents of public school or of *Catholic* school children. He said: "A policeman protects a Catholic, of course—but not because he is a Catholic; it is because he is a man and a member of society. The fireman protects the Church school—but not because it is a Church school; it is because it is property, part of the assets of our society. Neither the fireman nor the policeman has to ask before he renders aid 'Is this man or building identified with the Catholic Church?' But before these school authorities draw a check to reimburse for a student's fare they must ask just that question, and if the school is a Catholic one they may render aid because it is such, while if it is of any other faith or is run for profit, the help must be withheld."

As a practical matter, to deny private school children the benefit of the State aid provided by section 701 could widen the gap between those children in deprived areas who attend parochial schools and those attending public schools in the same areas who receive the benefits of all the many and necessary programs backed by the massive resources of both State and Federal Governments.

The order appealed from should be affirmed, without costs.

VAN VOORHIS, J. (dissenting). Plaintiff Boards of Education have, as it seems to us, capacity to sue. The cases holding that a public body has no standing to challenge a State statute restricting its governmental powers are not in point (e.g., *City of Buffalo* v. *State Bd. of Equalization*, 26 A D 2d 213; *County of Albany* v. *Hooker*, 204 N. Y. 1, 9-10; *Black Riv. Regulating Dist.* v. *Adirondack League Club*, 307 N. Y. 475, 487; *St. Clair* v. *Yonkers Raceway*, 13 N Y 2d 72, 76). The reasons for this conclusion are adequately stated in the opinion by Special Term and in the concurring opinion at the Appellate Division. These Boards of Education are not seeking to augment their powers by obtaining an adjudication that a statute is unconstitutional which purports to restrict their authority, but, instead, they are asking for a court determination (in the form of a declaratory judgment) concerning whether they are legally authorized to spend public money for purposes purporting to be authorized by this statute. If subdivision 3 of section 701 of the Education Law (as amd. by L. 1965, ch. 320, and L. 1966, ch. 795) is unconstitutional insofar as

---

(330 U. S., *supra*, p. 25.) Subdivision 3 of section 701 of the Education Law asks no questions about what school the child attends, thus avoiding even the objection raised by Mr. Justice JACKSON in his *Everson* dissent.

it authorizes the purchase of textbooks by school boards for loan to children enrolled in parochial schools, then the school boards would exceed their powers in making such expenditures. Upon the other hand, if that statute is valid, as the State Commissioner of Education has ruled, any disobedient school board member becomes liable to removal from office (Education Law, §§306, 1706) and the Commissioner may withhold public moneys from any district whose school board disobeys the Commissioner's directive implementing the statute.

The right of a local Board of Education to sue the State Commissioner of Education has frequently been upheld including actions involving the question of constitutionality of State statutes. (*Matter of Board of Educ. of Cent. School Dist. No. 2* v. *Allen,* 14 A D 2d 429; *Matter of Bethlehem Union Free School Dist.* v. *Wilson,* 303 N. Y. 107; *Matter of Board of Educ. of Union Free School Dist. No. 3* v. *Allen,* 6 A D 2d 316, affd. 6 N Y 2d 871.)

This brings us to the question whether this statute violates section 3 of article XI of the New York State Constitution, which reads as follows: "Neither the state nor any subdivision thereof shall use its property or credit or any public money, or authorize or permit either to be used, directly or indirectly, in aid or maintenance, other than for examination or inspection, of any school or institution of learning wholly or in part under the control or direction of any religious denomination, or in which any denominational tenet or doctrine is taught, but the legislature may provide for the transportation of children to and from any school or institution of learning."

The last portion of this section, relating to the transportation of children, was added by special amendment to obviate the immediate impact of the decision in *Judd*

v. *Board of Educ.* (278 N. Y. 200 [1938]). The *Judd* case held that this provision of the State Constitution was violated by the then section 206 of the Education Law insofar as it purported to authorize the use of public funds to pay for the transportation of pupils to or from schools wholly or in part under the control or direction of religious denominations or in which religious doctrines or tenets were taught. The providing of schoolbooks for such schools touches more nearly what section 3 of article XI of the Constitution was designed to prohibit than the transportation of pupils by bus. The origin and purpose of this constitutional provision are discussed so thoroughly in the opinion of the court by Judge RIPPEY that we shall not repeat here what was said. It is argued here that in the *Judd* case, the expenditures were to be for the benefit of the parochial schools, whereas under this statute, they are for the pupil under the so-called child benefit theory. The court in the *Judd* case, however, cites and follows *Smith* v. *Donahue* (202 App. Div. 656) which held to be unconstitutional a construction of subdivision 4 of the then section 868 of the Education Law which would authorize Boards of Education to furnish free textbooks and other supplies to the children attending parochial schools. The Appellate Division, Third Department, there said (p. 664): "It seems to us to be giving a strained and unusual meaning to words if we hold that the books and the ordinary school supplies, when furnished for the use of pupils, is a furnishing to the pupils and not a furnishing in aid or maintenance of a school of learning. It seems very plain that such furnishing is at least indirectly in aid of the institution and that, if not in actual violation of the words, it is in violation of the true intent and meaning of the Constitution and in consequence equally unconstitutional. (*People ex rel. Bol-*

ton v. *Albertson,* 55 N. Y. 50; *Matter of Hopper* v. *Britt,* 203 id. 144.)" The *Smith* case was, as above stated, cited with approval and followed in *Judd.*

Unless *Judd* and *Smith* be overruled, they are decisive of the present issue. It does not seem to us that any basic change has been wrought by the passage of time in the factors considered in *Judd* and *Smith.* The subject is controversial, and has been controversial in this country for over 200 years. It is unlikely that new developments have materially altered the basic considerations.

If this provision in the State Constitution were to be equated in these respects with the First Amendment to the Federal Constitution, it is by no means clear that the the result would be different. It is true, to be sure, as stated by Justice JACKSON in *McCollum* v. *Board of Educ.* (333 U. S. 203, 238) that there are times when "the legal 'wall of separation between church and state' [becomes] as winding as the famous serpentine wall designed by Mr. Jefferson for the University he founded." Nevertheless, the tendency of the Supreme Court has been rather strict in maintaining this wall of separation for reasons eloquently stated many years ago by Madison and Jefferson (*Engel* v. *Vitale,* 370 U. S. 421; *Abington School Dist.* v. *Schempp,* 374 U. S. 203; *McCollum* v. *Board of Educ.,* 333 U. S. 203, *supra*). *Everson* v. *Board of Educ.* (330 U. S. 1, permitting payments for bus transportation) might have been decided differently today, inasmuch as it was decided five to four with Justice DOUGLAS in the majority. He later wrote in *Engel* v. *Vitale* (370 U. S. 421), at page 443, that "The *Everson* case seems in retrospect to be out of line with the First Amendment * * * Mr. Justice RUTLEDGE stated in dissent what I think is durable First Amendment philosophy".

These and other decisions by the Supreme Court seem to have outdistanced *Cochran* v. *Board of Educ.* (281 U. S. 370). The Supreme Court therein was not bound by the First Amendment, which had not then been mandated on the States by the Fourteenth Amendment to the Federal Constitution, and the Louisiana court had held that there was no violation of the Louisiana Constitution (*Borden* v. *Louisiana State Bd. of Educ.*, 168 La. 1005). The furnishing of textbooks to the students of parochial schools was there sought to be restrained under the Fourteenth Amendment alone, as taking private property for a private purpose. The argument there prevailed that public aid was for the purchase of schoolbooks for the use of children rather than being for the school itself. This "student benefit theory" is hardly new, as respondents-intervenors assert that it is. It was overruled in this State in *Smith* v. *Donahue* (*supra*) and this court stated in the *Judd* case that the constitutionality of the Louisiana statute authorizing the appropriation of public funds for textbooks was decided under the Louisiana Constitution and "was not a Federal question." (278 N. Y. *supra*, pp. 213-214.) Our opinion in *Judd* continued by stating: "The reasoning followed in the Louisiana State courts has been followed in no other case to which our attention has been called, but has been expressly disapproved in *State ex rel. Traub* v. *Brown*, *supra* [36 Del. 181, 187, writ of error dsmd. Feb. 15, 1938]."

This 1894 amendment (N. Y. Const., art. XI, § 3) has its roots in the early history of the State and belongs to "the long and intensive struggle for religious freedom in America", which Justice RUTLEDGE mentioned in his dissenting opinion in *Everson* v. *Board of Educ.* (330 U. S. 1, 33-34, *supra*) of which he said the First Amendment "was the direct culmination." Despite differences in phraseology,

the object of both the First Amendment and this State amendment is to keep religion from being dominated by government and to prevent government from being dominated by pressure groups seeking to control it for the promotion of religion.

If the books to be purchased by Boards of Education and supplied to pupils of parochial schools were religious tracts, it is conceded that the statute would be unconstitutional. The mere circumstance that they would be loaned to the pupil rather than supplied directly to the school would not preserve its validity. The constitutionality of this enactment is sought to be sustained on the basis that the textbooks to be supplied are "secular" rather than "religious." Counsel for respondents assume that the clause in the section which states that they "shall be textbooks which are designated in any public, elementary or secondary schools in the state or are approved by any boards of education, trustees or other school authorities" means that the same books that are furnished to children attending public schools shall be furnished children attending private schools. The language does not exactly say this but, even if it were so construed, that would not sustain its constitutionality. The difficulty is that there is no reliable standard by which secular and religious textbooks can be distinguished from each other. In his concurring opinion in *McCollum* v. *Board of Educ.* (333 U. S. 203, 235, *supra*) Justice JACKSON observed that: "Perhaps subjects such as mathematics, physics or chemistry are, or can be, completely secularized", but he continued by pointing out (p. 236) that it is necessary even in "preparation for a worldly life to know the roles that religion and religions have played" in the story of mankind, and that it is impossible to teach music, architecture, painting, his-

tory or literature without verging upon the religious field. One of the most important reasons on account of which church communicants have chosen, with much financial sacrifice, to have their children taught in parochial schools, is that they have wanted them to be indoctrinated on these subjects with the church point of view. It would be too much to expect that were the church in control of public school instruction, textbooks would not be selected which present church interpretation of such historical, scientific or philosophic items, for example, as the Council of Trent, the Reformation, the Spanish Inquisition, the Encyclopedists, Astronomy (cf. Copernicus and Galileo), Evolution, Social Studies (e.g., birth control, divorce, abortion) or, to quote again from Justice JACKSON in *McCollum* (*supra*, p. 236), "even the New England effort to found 'a Church without a Bishop and a State without a King' * * *". The New Englanders succeeded, for a while, in creating one of the most absolute theocracies of all time. No doubt Jefferson and Madison had this in mind when they fashioned the First Amendment, as well as the grounds for rebellion of "Recusants" and "Dissenters" against the Church of England. "It is too much to expect that mortals will teach subjects about which their contemporaries have passionate controversies with the detachment they may summon to teaching about remote subjects such as Confucius or Mohammed. When instruction turns to proselyting and imparting knowledge becomes evangelism is, except in the crudest cases, a subtle inquiry." (*McCollum* v. *Board of Educ.*, 333 U. S. 203, 236, JACKSON, J., concurring.)

This has the most direct bearing upon the point presently at issue. If it were not true, church members who are com-

pelled by law to pay taxes for public schools would not feel constrained by conscience and discipline to support religious schools for their own children. If the state is to provide schoolbooks for instruction in "secular" fields, which have inseparable religious connotations, and parochial schools become increasingly dependent upon state money to provide textbooks, which are the lifeblood of education, this statute will create and foster a pressure to dominate the choosing of books that shall be used in the public schools (so that they may be used also in parochial schools) which will always be latent, and at certain times and places, irresistible, and, as action begets reaction, there will be an opposite tendency, equally dangerous, on the part of the state to dominate the church.

As in the case of a trustee (e.g., *Matter of Hubbell,* 302 N. Y. 246, 259), the motivation of a religious group may be of the best, and its sense of mission the most disinterested, and yet—unless we are to change our governmental philosophy—the fundamental law will not permit it to be placed in a position where its own interest depends upon eroding the principle of separation between church and state.

The tendency on the part of the state to dominate the church has been observed in every totalitarian country, and it is actually what the First Amendment and article XI (§ 3) of the State Constitution were designed to prevent. The writings of James Madison, in particular, indicate that his concern for the separation between church and state was that he believed it to be as much in the interest of religion as of government.

If there were some applicable standard by which secular and religious textbooks could be distinguished from each other, there would remain the question whether taxpayers'

money could be spent to buy necessaries for parochial schools, thus liberating funds to be spent upon more strictly religious objectives. We are not required now to determine the constitutionality of expenditures for school lunch programs, health and welfare services, busing, or even scholarships in the case of higher education. Our present concern is solely with textbooks for children, which are at the heart of the educational process.

The order appealed from should be reversed and the order and judgment of the Supreme Court, Albany County, be reinstated.

Judges BURKE, BERGAN and KEATING concur with Judge SCILEPPI; Judge VAN VOORHIS dissents and votes to reverse in a separate opinion in which Chief Judge FULD and Judge BREITEL concur.

Order affirmed.

Judgment on Remittitur

SUPREME COURT
STATE OF NEW YORK

ALBANY COUNTY

BOARD OF EDUCATION OF CENTRAL SCHOOL DISTRICT No. 1, TOWNS OF EAST GREENBUSH, NASSAU, SCHODACK, SAND LAKE and NORTH GREENBUSH, RENSSELAER COUNTY and CHATHAM, COLUMBIA COUNTY and BOARD OF EDUCATION OF UNION FREE DISTRICT No. 3, TOWNS OF NORTH HEMPSTEAD and OYSTER BAY, NASSAU COUNTY, NEW YORK,

Plaintiffs-Appellants,

—against—

JAMES E. ALLEN, JR., as Commissioner of Education of the State of New York,

Defendant-Respondent,

—and—

MICHAEL ROCK, ANTHONY DWILESKI, PETER GIRZONE, DOREEN BEAUDIN, CHARLES HAIGH and BARBARA BRENNAN,

Intervenor-Defendants-Respondents.

The above named appellants, the Boards of Education of the East Greenbush and Roslyn School Districts, having appealed to the Court of Appeals from an order of the Appellate Division of the Supreme Court, Third Judicial Department, entered in the office of the Clerk of that Court on the 6th day of January, 1967, reversing an order and judgment of Supreme Court, Albany County, entered in the office of the Albany County Clerk on the 30th day of August, 1966, holding Chapter 320 of the Laws of 1966, to be unconstitutional and void insofar as it provides for the

purchase and loan of textbooks to pupils attending religious schools, said order of reversal having held that the plantiffs had no standing to contest the constitutionality of an act of the State Legislature, and said appeal having been argued at a term of the Court of Appeals of the State of New York, commencing on February 14, 1967, by Marvin E. Pollock, Esq., of counsel for plaintiffs-appellants, and by Mrs. Jean M. Coon, of counsel for Louis J. Lefkowitz, Attorney General of the State of New York, attorney for defendant-respondent, and by Porter Chandler, Esq., of counsel for James J. MacKrell, Esq., attorney for intervenor-defendants-respondents, and briefs of amici curiae having been submitted, and after due deliberation, the said Court of Appeals, having handed down its decision, on June 1, 1967, affirming the order of the Appellate Division, three judges dissenting, holding Chapter 320 of the Laws of 1966 constitutional in all respects, without costs,

And the original record and remittitur of the Court of Appeals having been filed in the Albany County Clerk's office, it is

ORDERED AND ADJUDGED that the order and judgment of Supreme Court, Albany County, entered August 30, 1966, be and the same hereby is reversed.

JOHN S. BARTLETT, JR.
Albany County Clerk

Dated: Albany, New York
June 15, 1967